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No. 73-1834

In the Supreme Court of the United States

OCTOBER TERM, 1973

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENTS

CROSS-PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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Richard Nixon, President of the United States, through his counsel, cross-petitions for a writ of certiorari before judgment in the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS

The district court's opinion and order of May 20, 1974, denying the motions to quash the subpoena and to expunge are not yet officially reported.[1]

JURISDICTION

The jurisdictional statement filed by the Special Prosecutor in his Petition for Writ of Certiorari is hereby incorporated by reference.

[1] The full text of the Court's opinion and order are set forth in the Petition for Writ of Certiorari before Judgement filed by the Special Prosecutor May 24, 1974. (Hereinafter cited as Petition for Writ) See appendix A, pp. 15–23.

QUESTIONS PRESENTED

In addition to those questions presented by the Special Prosecutor in his Petition for Writ of Certiorari the following question is presented for review:

Whether, under the Constitution, a grand jury has the authority to charge an incumbent President as an unindicted co-conspirator in a criminal proceeding.

CONSTITUTIONAL PROVISIONS

The additional provisions of the United States Constitution are relevant to the question presented.

ARTICLE I

Sec. 2, par. 5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Sec. 3, par. 6. The Senate shall have the sole Power to try all Impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Sec. 3, par. 7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

ARTICLE II

Sec. 1, par. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected * * *.

Sec. 2, par. 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Sec. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed and shall Commission all the Officers of the United States.

Sec. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Sec. 2, par. 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

STATEMENT OF THE CASE

The statement filed by the Special Prosecutor in his Petition adequately presents the factual development of this case.

REASONS FOR GRANTING WRIT

It is our belief that the issue presented for review by this Cross-Petition is already before the Court.[2] The Special Prosecutor has understandably not identified this issue with particular clarity because of its prejudicial nature, and in an exercise of caution to insure that this critical issue is properly presented for review, we are filing this Cross-Petition.[3]

It is essential that the Court grant this Cross-Petition in order that the respondent not be divested

[2] See Letter from Counsel to the Special Prosecutor to Clerk, Supreme Court of the United States, dated June 3, 1974. We are in agreement with the Special Prosecutor that because of the grand jury matters involved, it is imperative that the Joint Appendix or portions thereof be placed under seal.

[3] See e.g., *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972) where respondent was precluded from seeking review of an adverse issue where no timely cross-petition for certiorari was filed. See also, *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1972).

of his right to appeal an adverse decision of a district court by at least one court of appellate jurisdiction. Moreover, this is an issue of first impression concerning a question of grave constitutional magnitude and import that should not be determined with finality by a single district court. If the decision of the district court on this issue is allowed to stand, we believe it seriously impinges upon the constitutional grant of authority vested in the United States House of Representatives by Article I. In addition, such a decision could be interpreted to mean that a President would be subject to similar action by any grand jury throughout the United States. The prejudicial nature and irreparable effect of such a grand jury finding cannot be seriously questioned. If the Court, however, deems it advisable for this issue to be severed and heard in the first instance in the United States Court of Appeals, due to the summary disposition of this issue by the district court, respondent has no objection. Moreover, in the course of this proceeding, if this Court finds it unnecessary to resolve this issue, for any reason, we request that the Court frame its order in such a manner as to preserve the appealability of this issue in a subsequent proceeding, if necessary.

CONCLUSION

For the reasons stated above, the cross-petition for certiorari should be granted, or in the alternative, the issue should be certified to the United States Court of Appeals.

Respectfully submitted,

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